Before the

Federal Communications Commission

Washington, D.C. 20554

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JUL 2 4 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular/PCS Cross-Ownership Rule	)	GN Docket No. 90-314

To: The Commission

PETITION FOR RECONSIDERATION

THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.

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Summary

This Petition for Reconsideration, filed by the National Association of Black Owned Broadcasters ("NABOB") in its capacity as a national trade association representing the interests of minority owned licensees and applicants in the PCS auctions, requests that the Commission reconsider the Report and Order (Amendment of Parts 20 and 24 of the Commission's Rules), WT Docket No. 96-56, GN Docket No. 90-314, FCC 96-278, released June 24, 1996 (the "Report and Order").

In the Report and Order, the Commission dramatically revised the rules governing the F Block auction for the ostensible purpose of assuring that the rules governing the F Block PCS auction complied with constitutional standards regarding race-based preferences mandated by the Supreme Court's recent decision in Adarand v. Peña, 115 S.Ct. 2097 (1995). The revisions made to the F Block auction rules are more damaging to prospective minority bidders than the changes that were made by the Commission to the C Block auction rules in the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding), PP Docket No. 93-253, 11 FCC Rcd 136 (1995), which modified the designated entity provisions of the C Block auction rules to make them race and gender neutral in light of Adarand. The rule revisions made by the Report and Order effectively remove the following three key incentives from the F Block auction rules that were instrumental in enabling minority owned businesses to be competitive in the C Block auction: 1) the Commission's elimination of the "Affiliation Exception" for qualifying small businesses, 2) the Commission's replacement of the 25% bidding credit available to qualified small-businesses with under $40 million in gross revenues in the C Block auction with a two tiered credit system under which only companies with gross revenues of under $15 million

would receive the 25% bidding credit, and 3) the Commission's replacement of the six year interest only payment plan option previously available to qualified C Block licensees with a much more capital-intensive two year interest only payment plan. If these three changes to the C Block auction rules are allowed to remain. minority-owned businesses will be placed at a severe economic disadvantage in the F Block auction.

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Spectrum Cap	)	
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Cellular/PCS Cross-Ownership Rule	)	GN Docket No. 90-314

To: The Commission

PETITION FOR RECONSIDERATION

The National Association of Black Owned Broadcasters ("NABOB"), by its attorneys and pursuant to Sections 1.106 and 1.429 of the Commission's Rules, hereby petitions the Commission for reconsideration of the Report and Order (Amendment of Parts 20 and 24 of the Commission's Rules), WT Docket No. 96-56, GN Docket No. 90-314, FCC 96-278, released June 24, 1996 (the "Report and Order")[1]. NABOB petitions the Commission to reconsider the Report and Order in its capacity as is a national trade association representing the interests of current minority FCC licensees, primarily in the broadcast industry, and minority owned licensees and applicants in the PCS auctions.

In the Report and Order, the Commission dramatically revised the rules governing these

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[1] NABOB is also requesting by a separate pleading, a stay of the Auction of the D, E, and F Block Broadband PCS licenses until final consideration of the instant Petition for Reconsideration of the Report and Order has occurred.

auctions for the ostensible purpose of assuring that the rules governing the F Block PCS auction complied with constitutional standards regarding race-based preferences mandated by the Supreme Court's recent decision in Adarand v. Peña, 115 S.Ct. 2097 (1995). As will be explained more fully below, the revisions made to the F Block auction rules are more damaging to prospective minority bidders than the changes that were made by the Commission to the C Block auction rules in the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding), PP Docket No. 93-253, 11 FCC Rcd 136 (1995), which modified the designated entity provisions of the C Block auction rules to make them race and gender neutral in light of Adarand[2]. The rule revisions made by the Report and Order effectively remove three key incentives from the F Block auction rules that were instrumental in enabling minority owned businesses to be competitive in the C Block auction

Specifically, the following three revisions made by the Commission to the F Block auction rules, if allowed to remain, will place minority-owned businesses at a severe economic disadvantage:

1) the Commission's elimination of Section 24.720(l)(11)(ii) of the Commission's rules, the "Affiliation Exception," for qualifying small businesses.

2) the Commission's replacement of the 25% bidding credit available to qualified small-businesses with under $40 million in gross revenues in the C Block auction with a two tiered credit system under which only companies

[2] It is important to note that the constitutionality of the changes made by the Sixth Report and Order was recently affirmed by the United States Court of Appeals for the District of Columbia Circuit in Omnipoint Corp. v. F.C.C., 78 F 3d 620 (D.C. Cir. 1996).

with gross revenues of under $15 million would receive the 25% bidding credit in the F Block auction, and

3) the Commission's replacement of the six year interest-only payment plan option previously available to qualified C Block licensees with a much more capital-intensive two year interest-only payment plan.

See Report and Order at ¶¶ 28-55.

I. BACKGROUND

A. Congress Directed the FCC to Promote Opportunities for Minorities to Acquire PCS Licenses

In 1993, Congress passed the Omnibus Budget Reconciliation Act which included Section 309(j) of the Communications Act, 47 U.S.C. Section 309(j).[3]

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[3] Section 309(j) provides, in pertinent part, as follows:

(1) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of the competitive bidding system. ... the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(a) the development and rapid deployment of new technologies, products, and services for the benefit of the public. including those residing in rural areas, without administrative or judicial delays;

(b) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women ...

(continued...)

It is clear from a plain reading of Section 309(j) that the Commission has a statutory obligation in its PCS auctions to: (1) avoid administrative and judicial delays, (2) avoid excessive concentration of licenses, (3) disseminate licenses to businesses owned by minorities, and (4) promote economic opportunity for businesses owned by minorities.

Prior to the Commission's auction of the C Block PCS licenses, there was virtually no minority ownership presence in the wireless telephone industry. This lack of minority involvement has overwhelmingly been attributed to discriminatory lending practices which continue to be the

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[3](...continued)
(2) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall-

> (a) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that <u>promote</u> (I) an equitable distribution of licenses and services among geographic areas, (ii) <u>economic opportunity for a wide variety of applicants</u>, including small businesses, rural telephone companies and businesses owned by members of <u>minority groups</u> and women, and (iii) investment in rapid deployment of new technologies and services;
>
> (b) ensure that small businesses, rural telephone companies, and businesses owned by members <u>of minority groups</u> and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures ...

(Emphasis added).

major stumbling block facing minority-owned businesses seeking to break into the highly capital-intensive wireless telecommunications industry. See Implementation of Section 309(j) of the Communications Act, Competitive Bidding, 8 FCC Rcd 7635, 7648 (1993), citing the "FCC Small Business Advisory Committee (SBAC) Report to the Federal Communications Commission Regarding Gen. Docket 90-314" (September 15, 1993), and 9 FCC Rcd 5536, 5571-5579, citing, inter alia, Small Business Credit and Business Opportunity Enhancement Act of 1992, Sections 112(4), 331(a)(3), (a)(4) and (b)(2)(3), Pub. Law 102-366, Sept. 4, 1992; Mortgage Lending in Boston: Interpreting MHDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

B. The Commission's Changes to the C Block Auction Rules in Light of the Adarand Decision Provided Limited Opportunities to Minority Owned Businesses

In the Sixth Report and Order, the Commission dramatically revised its rules relating to the C Block auction to assure that they complied with the new constitutional standard announced in Adarand. In the revisions announced in the Sixth Report and Order, the Commission eliminated all of the race-based distinctions contained in its rules pertaining to the PCS Auctions. However, rather than totally abandoning the financial incentives contained in the race-based preferences, the Commission instead chose to modify many of these preferences to enable them to be used by all small businesses that met enumerated financial criteria. Accordingly, the modified C Block auction rules enabled all qualifying small businesses to take advantage of many of the financial incentives originally promulgated to satisfy the Congressionally mandated policy of providing assistance to minority-owned businesses.

Individuals and entities that qualified as "small businesses" owned and controlled by minorities under the Commission's rules enjoyed a limited success in the C Block auction. According to the Commission's own calculations, 25 of the 89 winning bidders were minority controlled, and these entities won 150 of the 493 Licenses auctioned in the C Block auction.[4] These successful minority-owned bidders were able to overcome the substantial financing hurdles that continue to face minority-owned businesses and succeeded in the C Block auction largely because of the substantial financial incentives that were provided to small businesses under the C Block auction rules.

II. ANY MODIFICATION TO THE D, E, AND F BLOCK AUCTION RULES THAT LIMITS FINANCIAL INCENTIVES AVAILABLE TO SMALL BUSINESSES WILL BE HARMFUL TO POTENTIAL MINORITY-OWNED BIDDERS

It is imperative that the Commission, at a minimum, reinstate the financial incentives that it put in place for the C Block auction for the F Block auction. As the Commission stated in the Report and Order, when compared to the minority participation in the C Block auction, "in other auctions where no race-. . . based preferences were available minority- . . . owned firm participation has not been as substantial" Report and Order at ¶ 17. In order to prevent a decrease in minority participation in the F Block auction, the Bidding Credit and Installment Payment incentives that were available in the C Block auction must be extended to the F Block auction as well. These incentives are necessary because many, if not all, entities that intend to participate in the F Block auction have formulated their business plans with the expectation that the incentives available in the

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[4] But see, Petition to Deny Form 600 Applications of DCR PCS, Inc., filed by National Telecom PCS, Inc., which asserts that DCR PCS, Inc., which was the winning bidder on 43 of the C Block PCS licenses (including three of the top ten markets), falsely certified that it was a minority-owned business.

C Block auction would again be available in the F Block auction. The removal of these incentives places these entities' business plans in jeopardy, and may preclude these entities from being able to bid in the F Block auction. As was previously stated, this will be exceptionally difficult for minority-owned entities because of the substantial barriers to obtaining capital that these entities face. Accordingly, the net result of the Report and Order's changes to the auction rules will be to drive out the very minority-owned small businesses that the Commission has been mandated to attract.

A. The Elimination of Section 24.720(l)(11)(ii) of the Commission's Rules, the Exception to the Commission's Affiliation Rule, Imposes an Unfair Disadvantage on Those Winning C Block Bidders Who Designed Their Ownership and Control Group Structures for the F Block Auctions Based upon the C Block Auction Rules

The Commission's elimination of Section 24.720(l)(11)(ii) of its rules unfairly changes the rules for winning C Block companies that are in the middle of implementing their PCS business plans. The Commission's C Block auction rules allowed bidders to structure their ownership and control groups by making use of the affiliation exception. In developing business plans based upon the affiliation exception, C Block bidders designed business plans which included plans for bidding in the C Block and the F Block under the same bidding credit structure. The Commission's elimination of the affiliation exception, along with the new two tiered 15% small business and 25% very small business bidding credit structure, now seriously disrupts the business plans of winning C Block bidders.

Moreover, the rule change now allows other F Block entrants to structure new ventures to avoid the impact of the elimination of the affiliation exemption, while C Block winners are now locked into the structures adopted at the time of the C Block auction. Given the history of the C

Block auction, it is quite probable that a new entrant in the F Block auction could structure a new company to qualify as a very small business and, taking advantage of the 25% bidding credit, use that structure to bid for billions of dollars of F Block licenses. Depriving C Block bidders of the 25% bidding credit, because of a change in the affiliation rule at this late date, is inequitable and deprives C Block bidders of reasonable notice of this major change in the Commission's rules.

B. The Bidding Credit Plan Available to the C Block Bidders Must Be Reinstated

The small businesses that the Commission seeks to attract in the F Block auction are already faced with a daunting task. The broadband PCS frequencies being auctioned will be the last frequencies auctioned in a highly competitive market. The winners of the F Block auction will face substantial market pressures to immediately build out their facilities and will be forced to comply with unreasonably tight schedules in order to roll out their services before the market becomes dominated by the already-licensed A, B, and C Block frequencies. Accordingly, it comes as no surprise that the vast majority of the entities that presented comments on how the Commission should modify the bidding credit rules strongly supported retention of the 25% bidding credit for all small businesses in the F Block auction. These commentors pointed out to the Commission that "many bidders have reasonably expected that the F Block licenses would be available on terms similar to those of the C Block licenses and have made business plans based on this expectation," and that "the 25 percent bidding credit . . . is the essential feature which will allow designated entities to attract investors." Report and Order at ¶ 50.

However, the Commission apparently ignored this advice and, instead of providing all small businesses with the benefits previously reserved for minority-owned and woman-owned businesses (as it had done in the C Block auction), chose to dramatically limit the applicability and strength of the bidding credit program. Under the rules adopted by the Report and Order, the Commission established a two tiered bidding credit program under which entities with average gross revenues of no more than $15 million would receive a 25% bidding credit, while entities with average gross revenues of no more than $40 million would receive a 15% bidding credit. The Commission's rationale for imposing this two tiered bidding credit structure is fundamentally flawed.

The Commission's primary explanation for abandoning the 25% small business bidding credit utilized in the C Block auction was that

> "the timing of our modification here, as compared to the modifications that we made in the *Competitive Bidding Sixth Report and Order*, allows us to take a different approach than we took for the C block. When we modified our rules for the C block, we attempted to preserve the expectations and business strategies of applicants who had relied on their eligibility for a 25 percent bidding credit. The single 25 percent small business bidding credit adopted for the C block ensured that all prospective applicants were able to participate in the auction. Entities interested in bidding on F block licenses have not had similar expectations in structuring their businesses or formulating strategies in reliance on the tiered bidding credits originally adopted.

Report and Order at ¶ 55.

While the Commission's rationale for adopting the 25% bidding credit in the C Block auction was reasonable, its stated grounds for its decision to abandon this same bidding credit in the F Block auction is simply illogical. As with the C Block auction, the minority-owned entities that intend to participate in the F Block auction have been structuring their businesses and preparing their business plans and bidding strategies based on the understanding that, at a minimum, the Commission would preserve for them the rules as they existed in the C Block auction. Instead, the Commission has removed a key incentive from its rules based on the unsupportable assertion that the entities that had been organized to comply with either the rules as they existed before the Report and Order, or at the very least as the rules existed for the C Block auction, would not be affected by this eleventh hour modification to the Commission's rules.

Unless the rules promulgated in the Report and Order are changed, minority-owned entities that have, for the past several years, concentrated on pooling resources and attracting investors for the purpose of qualifying for the 25% bidding credit that has consistently been available to minority-owned entities that are "small businesses" will be placed at a significant disadvantage. It is particularly inequitable to C Block winners whose corporate structures are now frozen. Not only will these businesses no longer have access to the most favorable bidding plan, but they will be forced to accept the daunting task of determining how to procure the additional capital necessary to compete against other companies that will undoubtedly spring up to take advantage of this new rule. Clearly, unless the Report and Order's unnecessary restructuring of the bidding credit procedure is reversed, minority participation in the F Block auction will decline.

Accordingly, the Commission should reconsider the Report and Order and modify the Bidding Credit section of the Report and Order to, at a minimum, grant to prospective F Block bidders the same benefits that were made available to the C Block licensees.

C. The Six Year Installment Payment Option Must Be Reinstated

In its Public Notice, the Commission "requested comment on whether it is necessary to extend the most favorable C Block payment terms to F Block auction winners and, in particular, whether the six-year interest-only period serves the public interest, given that the amounts bid for the 10 MHZ licenses most likely will be lower than those bid for 30 MHZ license in the C Block auction." Report and Order at ¶ 38. Comments to the Commission on this issue almost unanimously supported retention of the installment payment provisions as they existed in the C Block auction.

These comments, which were primarily filed by small, minority-owned businesses, correctly noted that the installment payments were instrumental in providing these entities with the much needed financial benefits that enabled them to obtain licenses in the C Block auction. Furthermore, these comments pointed out that a removal or modification of the C Block's installment plans would disrupt established business plans and would unreasonably strain these cash-starved companies by forcing them to pay considerable sums to the government well before their businesses have a positive cash flow.

However, the Commission chose to ignore these comments and reduced the C Block's six year interest-only installment option for small businesses to a two year interest only installment option, stating that "[w]e believe that an interest-only period longer than two years is not necessary to help small businesses compete in the PCS marketplace." Report and Order at ¶ 45. The Commission apparently based its decision to dramatically depart from the C Block rule's six year interest-only period[5] on the assumption that:

> The build-out requirements for 10 MHZ licenses are more liberal than those for 30 MHZ licenses, requiring only a one-fourth population coverage or showing of substantial service within the first five years, as compared to the one-third population coverage required of 30 MHZ licenses. Given these less burdensome requirements, we believe that a two-year interest-only period will provide sufficient assistance to F block licensees by giving them a substantial period to devote resources to constructing their systems, while also encouraging them to provide service to the public quickly."

Report and Order at ¶ 45.

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[5] It is important to note that prior to the Sixth Report and Order's Adarand-based revision of the PCS Auction rules, the rules originally granted a two-year interest-only payment period to small businesses, while providing small businesses owned by minorities and/or women with a six-year interest-only payment period.

This assumption is without merit. Unless the Commission revises the Report and Order's rules, the small companies that the Commission hopes will participate in the F Block auction will be placed at a triple disadvantage. The licenses being auctioned in the F Block are for spectrum that will be utilized to provide services that will be competing against the already established Cellular licensees, the A & B Block Broadband PCS licensees that are already constructing their facilities, and the recently-licensed C Block Broadband PCS licensees. In order to successfully compete in this crowded market, the F Block licensees will be forced to expend considerable capital to build-out their facilities at a far faster rate than is mandated by the rules. By requiring, at year two, that these cash-strapped small businesses also begin repaying the principal on their loans while their C Block competitors, which are already enjoying a substantial head-start in system build-out, still have years before they need to worry about repaying the principal, is clearly grossly inequitable.

Accordingly, the Commission should modify the Installment Payments section of the Report and Order to grant to prospective F Block bidders the same benefits that were made available to the C Block licensees.

III. CONCLUSION

For the foregoing reasons, NABOB requests that the Commission grant the relief requested by this Petition for Reconsideration

Respectfully submitted,

THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.

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Dated: July 24, 1996

Certificate of Service

I, Rena I. Curtis, a legal assistant in the law firm of Rubin, Winston, Diercks, Harris & Cooke, L.L.P., do hereby certify that a copy of the attached **PETITION FOR RECONSIDERATION** was served this 24th day of July, 1996 to the following persons by hand-delivery:

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